NO. 85-241

(3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALAN McSURELY and MARGARET McSURELY,

Petitioners,

v.

JOHN K. McCLELLAN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BEST AVAILABLE COPY

REPLY TO THE BRIEF FOR RESPONDENTS IN OPPOSITION

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Preliminary Statement

The government's Brief in Opposition declares that the judgment below "does not rest on a single issue worthy of this Court's review" (Resp. 8). On the contrary, the court of appeals' decision incorrectly decided issues of paramount constitutional importance that have time and again engaged this Court's attention: the scope of immunity under the Speech or Debate Clause and the standard for granting qualified immunity to a government official who violates the constitutional rights of a private citizen.

ARGUMENT

1. The Speech or Debate Clause

The most significant fact about the respondents' Brief in Opposition is that the Department of Justice has not budged from the bizarre position that it took in oral argument before this Court on March 1, 1978 (Pet. 26). The Department still

contends -- and the court below bought the argument -- that if a legislative aide is investigating even without benefit of any formal process, he is by that fact immunized from any liability for anything he does. Ibid.

The position adopted by the court below and endorsed by the government in its brief would abolish the distinction that the Court has drawn between conduct which is an "integral part of the deliberative and communicative process" and conduct which merely "relates" to that process (Pet. 22-23). As applied to the investigatory activity of Congressmen and their aides, that distinction acts to immunize conduct which is part of a formal exercise of legislative authority (e.g., voting, a committee hearing, subpoenaing witnesses), but not the general gathering of information without benefit of any legal process (Pet.

23-25). The government argues that the power of Congress to investigate "is not limited to circumstances where subpoenas have been used" (Resp. 10). True enough, but the issue is not the power to investigate but the extent of the immunity to which Congressmen are entitled when they violate constitutional rights in pursuing their presumably legitimate investigations.

The government insists that the Court should avert its face from this crucial distinction because the conclusion of the court of appeals that petitioners had not proven their allegation of conspiracy by the Senate defendants to violate their First Amendment rights, is "factbound" and does not warrant review (Resp. 9). But the clearly erroneous nature of that contention is manifest from the government's distortion of the record on which the jury's verdict was

based. It is simply not true that "petitioner's evidence showed only that Senator McClellan may have investigated them as part of a private feud with columnist Drew Pearson" (Resp. 7). It could not be true because Pearson's love letter to petitioner Margaret McSurely came to light only after the investigation was ordered. The investigation resulted directly from information given to Duffy, a Senate Subcommittee staff member, by an old friend of his who had a close professional and political relationship with Ratliff and told Duffy about the activities of the civil rights activists whose organizing activities in Pike County Ratliff was attempting to stamp out (Pet. 2-5). Brick's haul of 234 documents contained not merely the Pearson love letter but petitioners' correspondence, address books with names of key anti-poverty field organizers, and

their copies of plans, programs and staffing of the civil rights organization with which they had been associated -- all core first amendment material (Pet. 9-10). Not one of these documents related to the Subcommittee's charge of investigating riots and civil and criminal disorders, yet McClellan and Adlerman instructed Brick to return to Pikeville for further rummaging, without benefit of subpoena, through petitioners' papers (Pet. 11). This evidence, not alluded to by the court of appeals or the government, was plainly sufficient to warrant the jury's finding, as alleged in the amended and supplemental complaint, that the Senate defendants conspired with Ratliff to harass petitioners in order to prevent them "from continuing their political, poverty and civil rights

activity in Eastern Kentucky" (Complaint ¶18(a)).[1]

In any case, the court of appeals did not limit its reversal to the supposed failure of proof or defect in jury instructions but chose to support it by a reading of Speech or Debate immunity that is totally at odds with the decisions of this Court and throws the law into dangerous confusion. This Court should not permit that obfuscation to persist in a field that is so important. The opinion below, if not corrected, and

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[1]The government asks how the verdicts could be upheld in the absence of any clear jury instruction as to the first amendment claims against the Senate defendants (Resp. 7, 9). If the first instruction was deficient, it was cured after a second inquiry from the jury. Any lack of clarity is not, in any event, chargeable to petitioners, whose proposed instructions explicitly sought a first amendment instruction as to all respondents. In any event, if there is a deficiency in the matter of instructions, the remedy is a new trial, not dismissal.

the government's response to our petition will be read as a message to legislators and their aides: You have only to structure your activities so that in a most attenuated fashion they appear to be connected with some investigative activity of a committee of which the legislator is a member -- and then anything goes. You may seize papers, destroy marriages by disclosing to one spouse the sexual history of the other, burglarize, and even if "not intuitively appealing" murder (Pet. 26). You may accept junkets allegedly to cement a relationship with a "source" of information, and who knows what else. The result of this reading of the Speech or Debate Clause is vast expansion of legislative privilege beyond any limits heretofore contemplated.

The Department of Justice has recently been emphasizing the need to search for the intent of the framers of

our Constitution. In that light, we note that the evidence is clear that our framers were acutely aware of the abuses of parliamentary privilege which prevailed in England under the Speech or Debate Clause (Wittke, The History of English Parliamentary Privilege, Ohio State University Studies, 1921), and were determined not to permit such a development in our nation.

Early on, Thomas Jefferson articulated the parameters of the privilege:

> For any speech or debate in either house they [legislators] shall not be questioned in any other place...; but this is restrained to things done in the house in a parliamentary course...for he is not to have privilege contra morem parliamentarium, to exceed the bounds and limits of his place and duty."

Jefferson, Manual of Parliamentary Practice III, "Privilege."

And in the first case which arose in this land interpreting the Speech or Debate Clause, it made clear that the

scope of the privilege was to be "the judgment of the court," Coffin v. Coffin, 4 Mass. 1, 32 (1808), and, additionally, that:

> The privileges are thus secured, not with the intention of protecting the members against prosecution for their own benefit, but to support the rights of the people."

Id. at 27.

Thus, in the United States, rooted in principles of egalitarianism, the Speech or Debate Clause, from the beginning has been viewed functionally in terms of what was truly necessary to protect the operations of the legislature, rather than from the point of view of establishing another group -- legislators -- who could claim "privileges," in those times so much a part of the English parliamentary structure.

Under the present Speech or Debate guidelines of the court, surgically crafted and tested in practice, the acts

of the respondents in this case were not legislative acts. The expansive reading of that clause by the court below supported by the government's brief calls for corrective action by this Court.

2. The Qualified Immunity Issue

The government states that "the court of appeals nowhere adopted (or even addressed) a rule immunizing under Harlow v. Fitzgerald, 457 U.S. 800 (1982) knowing violations of constitutional rights" (Resp. 12). But that is surely the effect of a decision that accords immunity to officials found by a jury to have acted with such knowledge. The government attacks petitioners' quotation of the trial court's careful instructions to the jury as to the facts they must find in order to overcome the Senate defendants' claim of immunity as "taken out of context" with the court's instructions of law as to the fourth

amendment rights that were clearly established in 1967 (Resp. 11-12). But the Senate defendants' claim of immunity rested on their assertion as a matter of fact that they believed Ratliff had authority to let Brick inspect and transport petitioners' documents; the jury found against them. Plainly, if they took the papers without such belief, they knew they were violating petitioners' constitutional rights.

For an answer to petitioners' contention that the court of appeals erroneously treated the prevailing and dissenting en banc opinions in the 1976 interlocutory appeal as statements of "law" for the purposes of Harlow, the government merely cited to the opinion below (Resp. 12) without the least effort to refute petitioners' demonstration that those opinions divided on disputed issues of fact, not law (Pet. 46-52). The

government prescribes a "simple reading" of Judge Wilkey's 1976 dissenting opinion; we join in this prescription, to which must be added a simple reading of Judge Leventhal's prevailing opinion. We respectfully submit it will be found that the question posed for summary judgment was whether there was a triable issue as to the scope of Ratliff's authority under the safekeeping order to hand over petitioners' documents to Brick. A large portion of Judge Wilkey's opinion is taken up with a review of what he regarded as the "settled evidence" for the purpose of showing that the facts precluded that issue. 553 F.2d at 1305-17. The facts assumed by Judge Wilkey formed the substratum for his statement of the law. The essence of the difference between the majority and minority was therefore factual. Moreover, the facts assumed by Judge Wilkey evaporated as the

result of new and unsettling evidence at the trial (Pet. 50-51). The Court of Appeals ought properly to have considered afresh the evidence adduced at trial and the jury findings based thereon in the light of the fourth amendment precedents existing in 1967. That procedure would have eliminated Harlow as a defense.

3. The Invasion of Privacy Issue

Perhaps because the court of appeals erroneously assumed that the verdict against McClellan and Adlerman for invasion of privacy rested on a theory of vicarious liability for Brick's actions in returning petitioners' documents, it failed to consider their complicity with Brick in the original taking and keeping of those documents. The government argues that, in any event, a claim based on this theory "would be barred by the Speech or Debate clause, which protects the act of authorizing an investigation"

(Resp. 13). This perpetuates the fallacy committed by the government and the court below in granting immunity to the Senate defendants for their first amendment violations. The private instructions of McClellan and Adlerman to Brick and their private dealings with petitioners' papers were not acts of the Subcommittee or acts "within the Subcommittee." Hence they were not legislative acts and not protected. This issue, too, needs to be reviewed by this Court.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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